

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

YOLANY PADILLA, *et al.*,
Plaintiffs-Petitioners,

v.

U.S. IMMIGRATION AND
CUSTOMS ENFORCEMENT, *et al.*,

Defendants-Respondents.

CASE NO. 2:18-CV-928

**AGREEMENT
REGARDING
DISCOVERY OF
ELECTRONICALLY
STORED
INFORMATION AND
[PROPOSED] ORDER**

The parties hereby stipulate to the following provisions regarding the discovery of electronically stored information (“ESI”) in this matter:

A. General Principles

1. An attorney’s zealous representation of a client is not compromised by conducting discovery in a cooperative manner. The failure of counsel or the parties to litigation to cooperate in facilitating and reasonably limiting discovery requests and responses raises litigation costs and contributes to the risk of sanctions.

2. The proportionality standard set forth in Fed. R. Civ. P. 26(b)(1) must be applied in each case when formulating a discovery plan. To further the application of the proportionality standard in discovery, requests for production of ESI and related responses should be reasonably targeted, clear, and as specific as possible.

B. ESI Disclosures

Within 45 days after the date of submission of this order, or at a later time if agreed to by the parties, each party shall disclose:

1. Custodians. The five custodians most likely to have discoverable ESI in their possession, custody or control. The custodians shall be identified by name, title, connection to the instant litigation, and the type of the information under his/her control.

2. Non-custodial Data Sources. A list of non-custodial data sources (e.g. shared drives, servers, etc.), if any, likely to contain discoverable ESI.

3. Third-Party Data Sources. A list of third-party data sources, if any, likely to contain discoverable ESI (e.g. third-party email and/or mobile device providers, “cloud” storage, etc.) and, for each such source, the extent to which this information is within the custody and control of the party.

4. Inaccessible Data. A list of data sources, if any, likely to contain discoverable ESI (by type, date, custodian, electronic system or other criteria sufficient to specifically identify the data source) that a party asserts is not reasonably accessible under Fed. R. Civ. P. 26(b)(2)(B).

C. Preservation of ESI

The parties acknowledge that they have a common law obligation to take reasonable and proportional steps to preserve discoverable information in the party’s possession, custody or control. With respect to preservation of ESI, the parties agree as follows:

1. Absent a showing of good cause by the requesting party, the parties shall not be required to modify the procedures used by them in the ordinary course of business to back-up and archive data; provided, however, that the parties shall take reasonable steps to preserve all discoverable ESI in their possession, custody or control.

2. All parties shall supplement their disclosures in accordance with Rule 26(e) with

discoverable ESI responsive to a particular discovery request or mandatory disclosure where that data is created after a disclosure or response is made (unless excluded under (C)(3) or (D)(1)-(2) below or otherwise privileged).

3. Absent a showing of good cause by the requesting party, the following categories of ESI need not be preserved:

- a. Deleted, slack, fragmented, or other data only accessible by forensics.
- b. Random access memory (RAM), temporary files, or other ephemeral data that are difficult to preserve without disabling the operating system.
- c. On-line access data such as temporary internet files, history, cache, cookies, and the like.
- d. Data in metadata fields that are frequently updated automatically, such as last-opened dates (see also Section (E)(5)).
- e. Back-up data that are substantially duplicative of data that are more accessible elsewhere.
- f. Server, system or network logs.
- g. Data remaining from systems no longer in use that is unintelligible on the systems in use.
- h. Electronic data (e.g. email, calendars, contact data, and notes) sent to or from mobile devices (e.g., iPhone, iPad, Android, and Blackberry devices), provided that a copy of all such electronic data is routinely saved elsewhere (such as on a server, laptop, desktop computer, or "cloud" storage).

D. Privilege

The parties will continue to confer regarding the nature and scope of privilege logs for the case, including whether categories of information may be excluded from any logging requirements as they arise, and whether alternatives to document-by-document logs can be exchanged.

1. With respect to privileged or work-product information generated after the filing of the complaint, parties are not required to include any such information in privilege logs.

2. Activities undertaken in compliance with the duty to preserve information are protected from disclosure and discovery under Fed. R. Civ. P. 26(b)(3)(A) and (B).

1 3. The parties intend to enter into a Fed. R. Evidence 502(d) agreement to govern the
2 clawback of any privileged material which will be separately submitted to the Court.

3 4. Privilege Log Based on Metadata. The parties agree that privilege logs shall include
4 a unique identification number for each document and the basis for the claim (attorney-client
5 privileged or work-product protection). For ESI, the privilege log may be generated using
6 available metadata, including author/recipient or to/from/cc/bcc names; the subject matter or title
7 and date created. Should the available metadata provide insufficient information for the purpose
8 of evaluating the privilege claim asserted, the producing party shall include such additional
9 information as required by the Federal Rules of Civil Procedure.

10 **E. ESI Discovery Procedures**

11 1. On-site inspection of electronic media. Such an inspection shall not be permitted
12 absent a demonstration by the requesting party of specific need and good cause or by agreement
13 of the parties.

14 2. Search methodology. The parties shall timely attempt to reach agreement on
15 appropriate search terms, or an appropriate computer- or technology-aided methodology, before
16 any such effort is undertaken. The parties shall continue to cooperate in revising the
17 appropriateness of the search terms or computer- or technology-aided methodology.

18 In the absence of agreement on appropriate search terms, or an appropriate computer- or
19 technology-aided methodology, the following procedures shall apply:

20 a. A producing party shall disclose the search terms or queries, if any, and
21 methodology that it proposes to use to locate ESI likely to contain discoverable information. The
22 parties shall meet and confer to attempt to reach an agreement on the producing party's search
23 terms and/or other methodology.

24 b. If search terms or queries are used to locate ESI likely to contain
25 discoverable information, a requesting party is entitled to no more than 5 additional terms or
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1 queries to be used in connection with further electronic searches absent a showing of good cause
2 or agreement of the parties. The 5 additional terms or queries, if any, must be provided by the
3 requesting party within 14 days of receipt of the producing party's production.

4 c. Focused terms and queries should be employed; broad terms or queries,
5 such as product and company names, generally should be avoided. Absent a showing of good
6 cause, each search term or query returning more than 250 megabytes of data is presumed to be
7 overbroad, excluding Microsoft PowerPoint files, image and audio files, and similarly large file
8 types.

9 d. The producing party shall search both non-custodial data sources and ESI
10 maintained by the custodians identified above.

11 e. The parties reserve their rights to identify responsive documents through
12 methods other than search terms, to include informed custodial self-identification. "Informed
13 custodial self-identification" means a process by which a document custodian, in consultation with
14 legal counsel, identifies folders, drives, or repositories of documents and/or ESI that are likely to
15 contain materials that are responsive to the Receiving Party's discovery requests.

16 3. Format. The parties agree that ESI will be produced to the requesting party with
17 searchable text, in a format to be decided between the parties. Acceptable formats include, but are
18 not limited to, native files, multi-page TIFFs (with a companion OCR or extracted text file),
19 single-page TIFFs (only with load files for e-discovery software that includes metadata fields
20 identifying natural document breaks and also includes companion OCR and/or extracted text
21 files), and searchable PDF. Unless otherwise agreed to by the parties, files that are not easily
22 converted to image format, such as spreadsheet, database and drawing files, should be produced
23 in native format.

24 4. De-duplication. The parties may de-duplicate their ESI production across
25 custodial and non-custodial data sources after disclosure to the requesting party.
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1 5. Metadata fields. If the requesting party seeks metadata, the parties agree that only
2 the following metadata fields need be produced: document type; custodian and duplicate
3 custodians; author/from; recipient/to, cc and bcc; title/subject; file name and size; original file
4 path; date and time created, sent, modified and/or received; and hash value.

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6 **F. MODIFICATION**

7 This Agreement may be modified by agreement of the parties or by the Court for good
8 cause shown.

9 Nothing in this Agreement shall be construed to prohibit the undersigned Parties from
10 agreeing to modify any provision of this Agreement or seeking relief from the Court. Nor shall
11 anything in this Agreement or any Party's compliance be construed as a waiver of any Party's
12 rights under the Federal Rules of Civil Procedure. Nor shall anything in this Agreement be
13 interpreted to require disclosure of information that is not relevant to the claims or defenses in this
14 case or that is protected by any applicable privilege. Nor shall anything in this Agreement be
15 construed to waive any objections as to the production, discoverability, or confidentiality of ESI.

1 RESPECTFULLY SUBMITTED this May 6, 2019.

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ORDER

Based on the foregoing, IT IS SO ORDERED.

DATED: _____

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT JUDGE

CERTIFICATE OF SERVICE

I hereby certify that on May 6, 2019, I had the foregoing electronically filed with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to those attorneys of record registered on the CM/ECF system. All other parties (if any) shall be served in accordance with the Federal Rules of Civil Procedure.

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